INDEX

CITATIONS

674560—63——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

Nos. 39 and 293

JOSE MARIA GASTELUM-QUINONES, PETITIONER

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The orders of the court of appeals (R. 48, 52) are not reported. The prior opinion of the court of appeals sustaining the validity of the order of deportation (R. 15–22) is reported at 286 F. 2d 824.

JURISDICTION

The judgment of the court of appeals in No. 39 was entered on September 13, 1961 (R. 48), and in No. 293 on February 23, 1962 (R. 52). In No. 293, a petition for rehearing *en banc* was denied on May 7, 1962 (R. 55). The petition for a writ of certiorari in No. 39 was filed on October 27, 1961, and the

petition in No. 293 on August 1, 1962. The petitions were granted on October 15, 1962 (R. 75). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals properly declined to reopen deportation proceedings a second time, in order to permit petitioner to testify that he did not personally advocate the overthrow of the government by force and violence.

2. Whether the evidence is sufficient to establish that petitioner is an alien subject to deportation because he had been, after entry into the United States, a "meaningful member" of the Communist Party.

3. Whether the court of appeals, in referring petitioner's case to the division of the court which had considered his original appeal, has denied petitioner judicial review because one judge, who initially did not sit, again failed to sit.

STATUTES INVOLVED

Section 241 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1251) provides in pertinent part:

> (a) General classes.
>
> Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> * * * * * *
>
> (6) is or at any time has been after entry, a member of any of the following classes of aliens:
>
> * * * * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; * * *.

* * * * *

28 U.S.C. 46 provides:

§ 46. Assignment of judges; divisions; hearings; quorum.

(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

(b) In such circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c) shall constitute a quorum.

STATEMENT

Petitioner, a native and national of Mexico, was ordered deported from the United States in 1957 on the ground that he was an alien who, after entry into this country, had been a member of the Com-

munist Party within the meaning of Section 241(a)(6)(C) of the Immigration and Nationality Act of 1952, *supra*. Subsequently, the Board of Immigration Appeals having reopened the hearings to permit petitioner to introduce new evidence, reaffirmed its order of deportation. The district court and court of appeals upheld this order, and this Court denied certiorari. In this, the third round of proceedings, petitioner moved the Board to reopen the deportation proceedings a second time to permit him to testify. This application was denied. Petitioner now seeks review of the judgment of the court of appeals which affirmed orders of the district court denying a preliminary injunction against his deportation and granting summary judgment for the Attorney General.

1. *The original proceedings.*—On March 23, 1956, petitioner, who had entered this country in 1920, was charged in a rule to show cause with being an alien who after entry had become a member of the Communist Party. From April 1956 to July 1956, five hearings were held before a special inquiry officer of the Immigration and Naturalization Service (R. 7).

The government's evidence showed that, at the time petitioner registered as an alien in 1940, he had stated that he had not belonged to any clubs, organizations, or societies. When the Service questioned him in 1953 concerning membership in the Communist Party, he refused to answer (R. 7).

Daniel Scarletto, a member of the Communist Party from 1947 to 1952, testified at the hearings that

he met petitioner in early 1949 at a meeting of the El Sereno Club, a unit of the Party consisting of 32 members (R. 59–60, 63). Attendance at El Sereno Club meetings was restricted to Party members and Scarletto saw petitioner at two meetings of this unit. Scarletto knew petitioner as Joe Castelum or Joe Vega, and knew him to be a member of the Party and the El Sereno unit (R. 63). When, on Party orders in 1949, the El Sereno unit was broken into smaller units for security reasons, both Scarletto and petitioner were transferred to the Mexican Concentration Club (R. 64–65). Petitioner was a regular member of this unit and his membership continued to the latter part of 1950 (R. 64). Scarletto saw petitioner at the closed meetings of the unit (R. 65, 66, 74), and collected Party dues from him during the entire period petitioner was in the Mexican Concentration Club except when petitioner "was transferred out for some other job" (R. 64–65). Scarletto also saw petitioner at a Communist Party convention, at which attendance was restricted solely to Party members; each person seeking admission was required to appear before a screening panel, state his club and position, and be identified by members of the panel before being permitted to enter (R. 66).

Fabian Elorriaga, a member of the Party from 1947 to 1951, testified that he met petitioner at a meeting of the 45th Concentration Club of the Party of which petitioner was a member (R. 67–68). Elorriaga thereafter saw petitioner at regular meetings of the club over a period of three years (R. 69). The

meetings were closed to all but Party members (R. 69). Elorriaga also recalled a restricted executive meeting at which petitioner was present, called either for organizational purposes or to formulate an agenda (R. 69). Later, Elorriaga testified that he recalled two closed meetings of the Concentration Club in 1949 and 1951 which petitioner attended (R. 71).

The special inquiry officer found petitioner deportable as a voluntary member of the Communist Party after entry. An appeal from the order was dismissed by the Board of Immigration Appeals on November 14, 1957 (R. 1–4). The Board found that the testimony introduced by the government established a *prima facie* case of voluntary membership in the Party from late 1948 or early 1949 to at least the end of 1950, which petitioner had made no attempt to rebut.

2. *The first reopening of proceedings and judicial review thereof.*—*a.* On January 13, 1958, after this Court's decision in *Rowoldt* v. *Perfetto*, 355 U.S. 115 (decided December 9, 1957), petitioner moved the Board for reconsideration of the order of deportation on the ground that his membership in the Communist Party did not meet the requirement of meaningful association laid down by *Rowoldt*. In the event reconsideration was denied, petitioner requested alternatively that proceedings be reopened to permit him to offer testimony to show that under *Rowoldt* he was not deportable (R. 5). On May 12, 1958, the Board ordered the proceedings reopened to permit petitioner to introduce evidence (R. 5–8).

At the reopened hearings before the special inquiry officer on December 16, 1958, petitioner, although voluntarily sworn, presented no testimony. He offered merely a statement by counsel claiming that the Board had misconstrued his request as one seeking an opportunity to offer testimony, and argued that the existing record did not establish meaningful membership within the standards set by *Rowoldt*. The statement suggested that the government present evidence (R. 9–13). The special inquiry officer, on the basis of the record previously considered, reaffirmed his original decision that the petitioner, after entry into this country, had been shown to be a voluntary member of the Communist Party by reasonable, substantial, and probative evidence. On May 18, 1959, the Board of Immigration Appeals dismissed an appeal, finding again that the record, upon which both sides were content to rest, established meaningful membership (R. 13–14).

b. On May 22, 1959, petitioner filed in the district court a complaint for declaratory and injunctive relief against the order of deportation, in which he alleged that the finding of Communist Party membership was based upon unwarranted inferences and that the statute under which deportation was ordered was unconstitutional as applied. The district court granted the government's motion for summary judgment, holding that the case was controlled by this Court's decision in *Galvan* v. *Press*, 347 U.S. 522, rather than by *Rowoldt*.

On December 8, 1960, the court of appeals affirmed

the dismissal of petitioner's complaint in an opinion by Judge Bastian, in which Judge Danaher joined. Judge Edgerton took no part in the consideration or decision of the case (R. 15–22). *Gastelum-Quinones* v. *Rogers*, 286 F. 2d 824 (C.A. D.C.). The court noted that the Internal Security Act of 1950 (64 Stat. 987, 1006, 1008) dispensed with the need for proving in each individual case that the alien advocated overthrow of the government by force and violence, as was necessary under the Alien Registration Act of 1940 (54 Stat. 670). Quoting the *Galvan* decision, it stated the test as follows (347 U.S. at 528; R. 20):

> It must be concluded * * * that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will.

The court of appeals added (R. 21):

> The present Act then applies to membership in the organization a presumption of espousal of the doctrines of the organization. Advocacy of the overthrow of the Government by force and violence is attributed to the subject of the deportation proceeding by (1) proof of membership in the Communist Party, (2) the legislative finding of the nature of the Party, and (3) the presumption that a member of a political organization espouses the tenets of the organization.

The court observed that in *Rowoldt* this Court spoke of "meaningful membership" in the context of specific circumstances where the evidence of membership in the Party came from the alien himself who, at the same time, offered an explanation which, if believed, destroyed the inference that he subscribed to Party objectives. The court therefore concluded (R. 21):

> We do not think that *Rowoldt* was in any sense a reversal or limitation of *Galvan*. Rather, we think that *Rowoldt* amplified the presumption of support which the statute draws from the bare fact of membership by making that presumption rebuttable.
>
> Therefore we think that the statutory scheme which was upheld in *Galvan* was only explained and not reversed by *Rowoldt* and remains in effect. Since the presumption of espousal of the basic tenets of an organization derived from the fact of membership is rebuttable, the burden is on the alien to come forward with an explanation, the Government having made a *prima facie* case by proving voluntary membership. We think that the findings of the Board that appellant's Party membership was meaningful is established by the record, and since appellant here failed to offer any evidence whatsoever, the presumption must stand.[1]

In a petition for rehearing (*en banc* or, in the alternative, by a division of the court) petitioner

[1] The court added that the Board did not draw any inference from petitioner's silence, that it (the court of appeals) did not do so, and that it found no occasion to determine under the circumstances whether such an inference could be drawn.

argued that the court's decision was erroneous in holding (1) that the alien had the burden of proving that his membership was not "meaningful"; (2) that the Internal Security Act of 1950 introduced a new presumption of personal advocacy of the violent overthrow of government *following* from organizational membership; and (3) that *Rowoldt* merely made the statutory presumption rebuttable. Petitioner also argued that his case should have been considered by a full division of three rather than two judges.[2] The petition for rehearing was denied on January 9, 1961.

In a petition for a writ of certiorari to this Court, petitioner argued that the evidence was insufficient to support the order of deportation; that the statute providing for deportation was unconstitutional as applied; and that the decision of the court of appeals represented a departure from established principles in shifting to the alien the burden of proving that his membership in the Communist Party was not "meaningful association." On April 3, 1961, this Court denied the writ. *Gastelum-Quinones* v. *Rogers*, 365 U.S. 871.

3. *The present proceedings.*—*a.* On May 4, 1961, following the denial of his petition for a writ of

[2] In a footnote petitioner recited the following:

"At the oral argument counsel were informed that Judge Edgerton was unable to attend the argument because of illness. When asked by the Court, counsel for both sides stated that they acquiesced in Judge Edgerton's participation in the decision without hearing the oral argument. No suggestion was made that the case would be considered by only two judges. The opinion states 'Judge Edgerton took no part in the consideration or decision of this case'."

certiorari, petitioner again applied to the Board of Immigration Appeals for leave to reopen the proceedings—this time in order that he might testify that he never personally advocated the overthrow of the government by force and violence. He argued that the court of appeals in its decision had in effect ruled that the crucial issue was whether he personally advocated overthrow of the government by force and violence; that, until the court's decision, neither he nor the government had considered that issue relevant, and that it was neither fair nor constitutional to deport him for failing to offer proof as to something that was not known to be at issue (R. 22–25). In an accompanying affidavit, petitioner swore that he would testify before the Board that "I have never advocated, supported or espoused, nor do I now advocate, support or espouse the overthrow of the government of the United States by force and violence" (R. 26).

After oral argument, the Board of Immigration Appeals on August 1, 1961, refused to reopen the proceedings for a second time (R. 27–32). It ruled, in reliance upon *Galvan*, that the inquiry as to whether an alien personally advocated violence was not material in a deportation proceeding unless it was a part of an effort to show that "he joined the Party accidentally, artificially, or unconsciously in appearance only'." *Galvan* v. *Press*, *supra*, 347 U.S. at 528 (R. 31). It held that the decision of the court of appeals in petitioner's case could not be interpreted as modifying either *Galvan* or *Rowoldt* so as to make deportation dependent upon proof that the alien or

the Party advocated the forceful overthrow of the government. The opinion meant only, the Board concluded, that it is proper for the alien to show nominal membership as a defense; *i.e.*, membership that is involuntary, or accidental, or, as in *Rowoldt*, membership for the purpose of obtaining the bare necessities of life (R. 31). The Board also rejected the argument that the test of membership laid down in relation to criminal prosecutions under the Smith Act in *Scales* v. *United States*, 367 U.S. 203, applied to deportation proceedings. It concluded that in petitioner's case "there is uncontradicted testimony to show that a voluntary meaningful membership existed"; that, at the reopened hearing, petitioner had "been given an opportunity to show that his membership was nominal" but had refused to present evidence on this issue; and that there was "no reason to believe his membership was nominal" (R. 32).

b. Petitioner thereupon instituted in the district court a second action for judicial review, seeking declaratory and injunctive relief upon the claim that the Board's denial of his motion to reopen was unconstitutional and illegal because the evidence which he proffered was crucial under the decision of the court of appeals in his case (R. 32–40). On August 14, 1961, the district court, after a hearing, denied a preliminary injunction finding no error in the Board's ruling. On September 13, 1961, the court of appeals (Judges Danaher and Bastian) denied a motion for a stay of deportation and affirmed the judgment of the district court (R. 48). On September 28, 1961,

the Chief Justice granted a stay until a petition for certiorari was denied or, if it were granted, until the judgment of this Court.[2] On October 15, 1962, certiorari was granted (No. 39, this Term).

On October 25, 1961, the district court, after hearing oral argument, granted the government's motion for summary judgment and dismissed petitioner's complaint (R. 50). Petitioner appealed and the government moved to affirm. This motion came before a division consisting of Circuit Judges Fahy, Danaher, and Bastian, which ordered on February 21, 1962, that it be referred to the division of the court which heard and decided petitioner's original appeal (R. 51). That division had consisted of Circuit Judges Edgerton, Danaher and Bastian. On February 23, 1962, the division of the court to which the motion had been referred affirmed the judgment of the district court. Judge Edgerton took no part in the consideration of the motion (R. 52).

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[2] The order of Chief Justice Warren was as follows:

"Upon consideration of the application of counsel for the petitioner and of the opposition of the Solicitor General thereto,

It is ordered that deportation of the petitioner be, and the same is hereby stayed provided a petition for a writ of certiorari is filed in this Court on or before October 28, 1961. In the event such petition is so filed and is denied, this stay is to automatically terminate. Should the petition be granted this stay is to continue, pending the issuance of the judgment of this Court."

The district court in dismissing petitioner's complaint on October 25, 1961, ordered a stay of deportation to run concurrently with that granted by the order of the Chief Justice.

On March 9, 1962, petitioner filed a petition for a rehearing *en banc*. Again attacking the initial decision as to deportation as erroneous, he argued that each of his three appeals "has been decided by the same two judges and none * * * by three judges," and that his "last appeal was transferred to a panel of which, predictably, only two judges would participate"—a situation which he said was inconsistent with the spirit of 28 U.S.C. 46 (R. 53–55). On May 7, 1962, the petition for rehearing *en banc* was denied (R. 55). The grant of certiorari in No. 293 relates to the affirmance of the order dismissing the complaint.

SUMMARY OF ARGUMENT

I

The Board of Immigration Appeals has broad discretion whether to reopen deportation proceedings after a determination has been made. Petitioner's deportation had been fully litigated, including denial of certiorari by this Court, after the Board reopened the proceedings to allow petitioner to present testimony. The Board did not abuse its discretion in refusing to reopen the deportation proceedings for a second time, when the only basis for the second reopening was petitioner's proffered testimony that he did not personally advocate overthrow of the government by force and violence.

The Board determined, and petitioner admits, that the proffered evidence was immaterial under this Court's decisions in *Galvan* v. *Press*, 347 U.S. 522,

Rowoldt v. *Perfetto*, 355 U.S. 115, and *Niukkanen* v. *McAlexander*, 362 U.S. 390. Those cases held that an alien, to be subject to deportation, need not support the Party's advocacy of violence. It is sufficient if he was "aware that he was joining the organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will"; that is, that the alien did not join the Party "'accidentally, artificially or unconsciously in appearance only.'" *Galvan* v. *Press*, *supra*, 347 U.S. at 528.

Petitioner relies on the earlier court of appeals' opinion in this case to show that evidence concerning the alien's support of violence is relevant. But that opinion cannot overturn the decisions of this Court which petitioner admits are inconsistent with his interpretation of it. While petitioner cites the doctrine of the law of the case, that rule does not apply when the earlier decision was clearly erroneous. We disagree, moreover, with the argument that the prior court of appeals' opinion made it incumbent upon the Board to determine whether petitioner supported violent overthrow. This view is confirmed by the second opinion of the court of appeals, rendered by the same panel, rejecting petitioner's contention that the Board's refusal to reopen was inconsistent with its first decision.

II

The evidence established that petitioner's membership in the Communist Party was meaningful. This issue was fully litigated in the earlier appeal, and

therefore petitioner has an unusually heavy burden in contending that the determinations of the Board were erroneous.

The record here shows that petitioner was an active, dues-paying, voluntary member of the Communist Party who attended meetings limited to Party members from 1949 to 1951. This is meaningful membership under the test laid down in *Galvan*, *Rowoldt*, and *Niukkanen*. Unlike the situation in *Rowoldt*, there is nothing in the record to show that this membership was motivated by considerations other than political ones. Petitioner has declined to suggest this even though proceedings were reopened at his own request to permit him to bring himself within the framework of *Rowoldt*. Once evidence was introduced having a strong tendency to show that he was a knowing member, petitioner took the risk of having the adverse inference drawn unless he came forward with any facts which might rebut the evidence. Even in criminal cases, it is well established that once a *prima facie* case is made a defendant runs the risk of the inferences that may be drawn if he fails to present evidence.

Petitioner claims that *Scales* v. *United States*, 367 U.S. 203, requires proof that he was an active Party member. But that case, approving the test for deportation in *Galvan* and *Rowoldt*, stated a test for criminal prosecution under the Smith Act. In any event, the evidence here plainly shows that petitioner was an active member of the Communist Party.

III

Petitioner contends that, in transferring his case to the same division of the court which had heard his original appeal, the court of appeals knew, or must have known, that the one judge who did not previously sit would not sit again. That this was known does not in fact appear. In no event, moreover, were petitioner's rights violated. Certainly, it was reasonable to have the case transferred to the same panel which had issued the earlier opinion since the basis of petitioner's argument was that the Board had failed to follow the court's directions. The transfer fully met the requirements of 28 U.S.C. 46. The case was referred to a division of three judges, and the required quorum of two judges decided it.

ARGUMENT

I

THE BOARD OF IMMIGRATION APPEALS PROPERLY REFUSED TO REOPEN THE DEPORTATION PROCEEDINGS FOR THE SECOND TIME. IN THE ABSENCE OF ANY EVIDENCE THAT HIS MEMBERSHIP WAS NOT MEANINGFUL, IT WAS NOT MATERIAL WHETHER PETITIONER WOULD TESTIFY THAT HE DID NOT PERSONALLY ADVOCATE VIOLENT OVERTHROW OF THE GOVERNMENT

The Board of Immigration Appeals ordered petitioner deported from the United States as an alien who had been a member of the Communist Party after his entry. Section 241(a)(6)(C)(i) of the Immigration and Naturalization Act of 1952, *supra*, pp. 2–3, specifically provides for the deportation of an

alien who "at any time has been after entry a member of * * * the Communist Party of the United States * * *." Petitioner contends (Br. 17–23) that it was error for the Board to decline to reopen the proceedings for a second time to permit petitioner to offer evidence that he did not personally advocate overthrow of the government by force and violence.

It should be emphasized at the outset that an alien who has been ordered deported does not have an absolute right to have the deportation proceeding reopened. The standard applied by the Board (Finucane, *Procedure Before the Board of Immigration Appeals,* 31 Int. Rel. 31 (1954)) is as follows:

> As a matter of general principle, the Board believes that a case ought to be adequately developed in the first instance, and hence the Board is very reluctant to reopen a case which could have been but was not fully developed at the initial hearing. * * * [T]he Board will not reopen a case except for real and substantial reasons.

See *In the Matter of M———*, 3 I. & N. Dec. 490, 492. The federal courts have uniformly held that the Board's determination whether to permit reopening to reconsider the determination of deportability may be overturned only if the alien demonstrates a clear abuse of discretion. *Rystad* v. *Boyd*, 246 F. 2d 246, 249 (C.A. 9), certiorari denied, 355 U.S. 912; *Dentico* v. *Immigration and Naturalization Service*, 303 F. 2d 137 (C.A. 2); *United States ex rel. Pappageanakis* v. *Shaughnessy*, 114 F. Supp. 371, 375 (S.D. N.Y.); see Gordon and Rosenfield, *Immigration Law and Procedure* (1959), pp. 51, 585–586. The

courts have likewise held that it is within the discretion of the Board whether to reopen deportation proceedings in order to allow the alien to apply for suspension of deportation. *Arakas* v. *Zimmerman*, 200 F. 2d 322, 325 (C.A. 3); *Wolf* v. *Boyd*, 238 F. 2d 249 (C.A. 9), certiorari denied, 353 U.S. 936; *Jimenez* v. *Barber*, 252 F. 2d 550 (C.A. 9); accord, *In the Matter of M———*, 5 I. & N. Dec. 472, 474–475. Since in this case the Board had once before opened the deportation proceeding on petitioner's request, it had especially broad discretion in determining whether to reopen it again. Litigation must come to an end at some point. Petitioner therefore has a particularly heavy burden—to show that the evidence he wished to introduce was not only relevant, but crucial.

The Board plainly did not abuse its discretion. Petitioner, at the initial hearing, had the opportunity, which he declined, to rebut the government's evidence that he had knowingly joined the Communist Party after entry into the United States. He had the same opportunity at the reopened hearing—which he again declined—to show that this knowing membership was not "meaningful" under the decision of this Court in *Rowoldt* v. *Perfetto*, 355 U.S. 115. At the stage when he sought a second reopening, he had already had judicial review of the question whether the evidence introduced by the government established the kind of membership in the Communist Party which would subject him to deportation under *Rowoldt*. 286 F. 2d 824, certiorari denied, 365 U.S. 871. Yet, the only evidence which he proffered as the basis for a further

administrative proceeding was his own testimony that he did not advocate the overthrow of the government by force and violence (see the Statement, *supra*, p. 11)—evidence which, if true, would not lead to a different result under *Galvan* v. *Press*, 347 U.S. 522, and subsequent decisions of this Court.

In analysing these decisions, it is useful to review briefly the history of the various enactments which frame the issue. In 1910, Congress provided for the deportation of aliens advocating overthrow of the United States by force and violence. 36 Stat. 263, 264. In 1917, aliens were made deportable if, at any time after entry, they were found to advocate violent overthrow. 39 Stat. 889. The grounds for deportation were extended in 1918 to any alien who was a member of, or affiliated with, any organization which teaches or advocates violent overthrow. 40 Stat. 1012. When this Court in 1940 held that the Act reached only aliens who were current members of subversive organizations (*Kessler* v. *Strecker*, 307 U.S. 22), Congress, the next year, in the Alien Registration Act specifically made all aliens deportable who had any time in the past been members of such organizations. Thus, throughout this period, an alien was deportable only upon proof that he personally advocated, or that he was a member of an organization which was shown to advocate violent overthrow.

In the Internal Security Act of 1950, Congress for the first time provided for the deportation of any alien who had been a member of the Communist Party at any time after entry into the United States.

This provision—which was the immediate predecessor of the 1952 provision involved in this case—on its face eliminated any requirement of proof that the alien personally advocated, or that the organization of which he was a member advocated, violent overthrow. Nonetheless, in *Galvan* v. *Press* this Court was asked to construe the Internal Security Act of 1950 as providing for the deportation only of those aliens who joined the Communist Party fully conscious of its advocacy of violence. The Court found that the statute precluded such an interpretation. 347 U.S. at 525–526. It contrasted the language of the subsection providing for deportation of former Communist Party members with that of a subsection providing for deportation of aliens who were members of organizations required to register under the Act (*i.e.*, "Communist-action" and "Communist-front" organizations). It noted that the latter subsection contained an escape provision—"unless such aliens establish that they did not know or have reason to believe at the time they became members or affiliated with such an organization * * * that such organization was a Communist organization." The purpose of this escape provision was, according to Senator McCarran (the sponsor of the Act), to exempt from deportation "aliens who were innocent dupes when they joined a Communist-front organization, as distinguished from a Communist political organization" (such as the Communist Party). See 96 Cong. Rec. 14180. In view of this escape provision for members of other organizations, the Court reasoned that Congress clearly did

not intend to exempt "innocent" members of the Communist Party. 347 U.S. at 526.

The Court also relied on the legislative history of the 1951 statute which amended the Internal Security Act by providing that aliens who had joined an organization advocating violent overthrow when they were children, or by operation of law, or in order to obtain the necessities of life would not be deemed members of the organization. 65 Stat. 28. The legislative history of this statute included repeated references to the fact that "member" was intended to have the same meaning in the 1950 Act as it had been previously given by courts and administrative agencies, and that the judicial and administrative decisions prior to 1950 had not exempted aliens who joined an organization unaware of its programs and purposes. 347 U.S. at 527–528. The sponsor of the 1951 Act, Senator McCarran, inserted in the Congressional Record a memorandum—which this Court called a "weighty gloss on what Congress wrote" (347 U.S. at 527)—which made clear that the Act was not intended to authorize the deportation of aliens who, "accidentally, artificially, or unconsciously in appearance only" were members of the Communist Party. 97 Cong. Rec. 2373; see 347 U.S. at 527.

On the basis of this legislative history, the Court held in *Galvan* that (347 U.S. at 528):

> [S]upport, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. *It is enough that the alien joined the Party, aware that he was joining an organiza-*

> *tion known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will.* A fair reading of the legislation requires that this scope be given to what Congress enacted in 1950, however severe the consequences and whatever view one may have of the wisdom of the means which Congress employed to meet its desired end. [Emphasis added.]

The Court concluded (*id.* at 528) that the alien had not "'accidentally, artificially or unconsciously in appearance only'" joined the Party and (*id.* at 529) that "the record does not show a relationship to the Party so nominal as to make him a 'member' within the terms of the Act." The order of deportation was therefore upheld.

This Court's decision in *Galvan* was in no way overruled by *Rowoldt* v. *Perfetto*, 355 U.S. 115. Instead, the Court affirmed the legal test stated in *Galvan* (*id.* at 120): "There must be a substantial basis for finding that an alien committed himself to the Communist Party in consciousness that he was 'joining an organization known as the Communist Party which operates as a distinct and active political organization * * *' [*Galvan* v. *Press*,] 347 U.S. at 528." Applying this test the Court said that since, insofar as the record showed, the alien's reason for joining the Party may have been to earn a living by working in a Party bookstore rather than to support any political cause whatever, "the dominating impulse to his 'affiliation' with the Communist Party may well have been wholly devoid of any 'political' implica-

tions." 355 U.S. at 120.* The Court therefore concluded that the government had not proved "meaningful association with the Communist Party" required by the *Galvan* decision.

Only three terms ago, in *Niukkanen* v. *McAlexander*, 362 U.S. 390, the Court again considered whether an alien was deportable as a result of membership in the Communist Party under the Internal Security Act of 1950. Again, the Court applied the standard first laid down in *Galvan* in stating that "[t]he ultimate question is whether petitioner is subject to deportation under *Galvan* v. *Press*, 347 U.S. 522, or is saved from it under *Rowoldt* v. *Perfetto* * * *." 362 U.S. at 391.

Section 241(a)(6)(C)(i) of the Immigration and Nationality Act of 1952, under which petitioner was ordered deported, is virtually identical with the 1950 provision involved in *Galvan*, *Rowoldt*, and *Niukkanen*. The principles announced in *Galvan*, and affirmed in *Rowoldt* and *Niukkanen*, are therefore controlling here. The Board of Immigration Appeals was properly following decisions of this Court when, in refusing to reopen the deportation proceedings, it held that "an inquiry into whether an alien personally advocated violence is not material in a deportation proceeding unless it is part of an effort by the alien to show that his membership was of a nature described in *Galvan* as accidental, artificial, or un-

* The case was not decided under the exception, added by the 1951 amendment, relating to aliens joining the Party in order to obtain the necessities of life.

consciously in appearance only" (R. 31). Petitioner, however, proffered no evidence that his membership was not deliberate and meaningful; his sole offer of proof, if the hearings were reopened a second time, was to testify that he had never supported violent overthrow.

Petitioner himself specifically admits (Pet. Br. 8–9, 13, 20) that evidence as to whether he had personally advocated overthrow of the government by force and violence is immaterial to deportability under *Galvan* and *Rowoldt*. He therefore impliedly concedes that the Board's determination not to reopen the proceedings to hear his testimony on this issue was consistent with the rulings of this Court. Nonetheless, he contends that the Board erred, his theory being that the first opinion of the court of appeals made the issue whether he personally advocated violence material to his deportation.

This argument is plainly unsound. *First,* since the *Galvan* and *Rowoldt* decisions of this Court are of course controlling, it is irrelevant whether petitioner's interpretation of the court of appeals' opinion is correct or not. It is sufficient that the Board correctly followed the decisions of this Court. Petitioner contends (Br. 19-20) that the court of appeals' earlier decision was the law of the case. But as petitioner himself correctly states (Br. 22):

> * * * [T]he law of the case rule is a rule of practice, not a limitation on the court's power, and the court will disregard the rule when, but only when, "a clear case * * * [is] * * * presented showing that the earlier adjudication

> was plainly wrong and that application of the rule would work manifest injustice." *Mayflower Hotel Stockholders Protection Committee* v. *Mayflower Hotel Corp.*, 193 F. 2d 666, 669; *Brown* v. *Gesellschaft Fur Drahtluse Tel.*, 104 F. 2d 227, 228; *Davis* v. *Davis*, 96 F. 2d 512; *Messinger* v. *Anderson*, 225 U.S. 436, 444.

Since petitioner likewise admits that, under his interpretation of the court of appeals' prior decision, that decision was directly in conflict with decisions of this Court, it was plainly wrong and hence not controlling.[8]

Second, the Board's refusal to reopen the deportation proceedings to hear petitioner's testimony that he had never personally advocated violent overthrow is in fact consistent with the earlier court of appeals' opinion. It may be granted that the opinion is not entirely clear (see the Statement, *supra*, pp. 7–9). On the one hand, it quoted *Galvan* v. *Press* to the effect that proof of support or even knowledge of the Party's advocacy of violence was not a prerequisite to deportation. The court of appeals stated that such advocacy was attributed to the individual alien by proof of membership, the legislative finding as to the nature of the Party, and the presumption that a

[8] The court of appeals' interpretation of the Act in its earlier decision should not be binding on the government for an additional reason. Since the government prevailed on that appeal, it could not seek review in this Court. Petitioner, having been unsuccessful in the prior litigation, cannot now claim that the error he asserts the court of appeals made is binding on the government.

member of a political organization espouses the tenets of the organization. On the other hand, in noting that *Rowoldt* neither reversed nor limited *Galvan*, the court did say that *Rowoldt* "amplified" the presumption of support for violent overthrow which the statute draws from membership by making that presumption rebuttable, with the burden on the alien to come forward with an "explanation." As the Board noted, this language as to rebutting the presumption, read in the light of the whole opinion, appears to mean only that (R. 31):

> * * * it is proper to show nominal membership as a defense; i.e., as in *Galvan*, membership that is involuntary, accidental, artificial, or unconsciously in appearance only: or as in *Rowoldt*, membership for the purpose of obtaining food and other necessities by one who presumably would just as well have joined the Salvation Army or one of the major political parties if he could thereby have obtained his necessities.

Any other interpretation of the first court of appeals' opinion would, as we have seen, make the opinion inconsistent with *Galvan* and *Rowoldt*.

The interpretation of the Board of Immigration Appeals has been confirmed, at least insofar as it is relevant here. The Board may or may not have been correct in interpreting the first court of appeals' opinion to mean that the alien could show nominal membership, rather than, as petitioner contends, that the alien has the burden of showing lack of support of violent overthrow. But at the least the Board was

correct in holding that the court of appeals did not mean that an alien could take himself outside the Act merely by his own testimony that he had never supported violent overthrow. For the Board held that petitioner's proffer of testimony on this subject, which was unaccompanied by any other proffer of evidence, was not material to deportability and therefore did not justify reopening the deportation proceedings. Petitioner argued before the court of appeals that the Board's determination was inconsistent with the appellate court's earlier decision. And the same division of the court of appeals which rendered the original opinion, on which petitioner relied, upheld the determination of the Board.

II

THE EVIDENCE ESTABLISHED THAT PETITIONER'S MEMBERSHIP IN THE COMMUNIST PARTY WAS MEANINGFUL

Petitioner also contends (Br. 24–32) that the evidence before the Board was not sufficient to support its finding that petitioner held meaningful membership in the Communist Party so as to make him subject to deportation under Section 241 of the Immigration and Nationality Act of 1952. This issue has been fully litigated and decided contrary to petitioner's contention. The Board of Immigration Appeals stated in its first review (R. 2):

> This testimony establishes a prima facie case of voluntary membership. The respondent made no attempt to rebut this prima facie case. He did not assert that the membership was in-

> voluntary. We believe this record establishes that respondent's membership was voluntary.

Contrary to petitioner's assertion (Br. 27), the Board did not draw an inference from what petitioner has called "bare, organizational membership." In denying petitioner's motion for reconsideration in light of *Rowoldt*, but allowing him to offer additional testimony on this subject, the Board compared petitioner's silence and the period of association with that of Rowoldt (R. 7): "Here we have nothing to prevent the drawing of the normal inferences which flow from the joining of a political party and long association with it." After reopening, the Board found (R. 14):

> Both sides are content to rest upon the record. The record establishes membership. *We believe it establishes meaningful membership.* Our previous opinion has set forth our reasoning. [Emphasis added.]

The district court and the court of appeals—applying, as we have shown above, the proper tests—considered the facts in detail in reviewing the Board's determination and sustained its findings (see the Statement, *supra*, pp. 7–9). The evidentiary issue was relied on in the petition for a writ of certiorari, which this Court denied. Since the issue of sufficiency of the evidence was fully litigated, petitioner has, at the very least, a heavy burden in claiming that the earlier determinations were erroneous. This Court has held that it will not normally reassess administrative findings which have been carefully

considered by the lower courts. *Peurifoy* v. *Commissioner*, 358 U.S. 59, 61; *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 400–401; *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502–503. *A fortiori*, in the absence of plain error, the prior review of the Board's findings in litigation taken to the highest Court must be held controlling.

Even if one assumes that petitioner is entitled to relitigate *de novo* the sufficiency of the evidence, we submit that the lower courts were correct in determining that the Board's findings were amply supported by the evidence. Indeed, even if one considers and credits petitioner's proffer of testimony that he never supported violent overthrow of the government, the evidence still demonstrates meaningful membership justifying deportation. For, as we have seen, the test of membership under the decisions of this Court is whether the alien freely joined the Communist Party as a distinct political organization, not whether he intended to support the Party's objective of overthrow of the government by force and violence.

In *Galvan* v. *Press*, the Court, applying this test, found that the facts showed that the alien was deportable. It sustained the hearing officer's finding that Galvan had been a "member" of the Communist Party from 1944 to 1946 on the basis of (1) Galvan's admissions, subsequently denied, that he had joined the Party, attended meetings, and refrained from applying for citizenship for fear of exposing such membership, and (2) the testimony of a witness that Galvan had been an officer of a Communist Party unit. The

Court noted that there had been no claim that membership was obtained " 'accidentally, artificially, or unconsciously in appearance only' " (347 U.S. at 528), and concluded that the record did not show a relationship to the Party so "nominal" as not to make Galvan a "'member" within the terms of the Act (*id.* at 529).

In *Rowoldt* v. *Perfetto*, the Court applied the principles announced in *Galvan* to a different factual situation. On appraisal of the particular circumstances in *Rowoldt*, however, the Court found the evidence too insubstantial to show any meaningful membership. The evidence consisted solely of the testimony of Rowoldt before an immigration inspector,* that, while he had belonged to the Communist Party for a year in 1935, he viewed the Party as having one aim, "to get something to eat for the people" 355 U.S. at 117. In view of Rowoldt's unchallenged account of his relations to the Party—his statements that membership had been motivated by a "fight for something to eat and clothes and shelter" and "fighting for the daily needs"—the Court found that "the dominating impulse to his 'affiliation' with the Communist Party may well have been wholly devoid of any 'political implications'." *Id.* at 120. The Court noted that "[t]he differences on the facts between *Galvan* v. *Press*, *supra*, and this case are too obvious to be detailed." *Id.* at 121.

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* At later deportation hearings Rowoldt had refused to answer whether he had been a member of the Communist Party on the ground that the answers might incriminate him.

Subsequently, in *Niukkanen* v. *McAlexander, supra*, the Court had before it a record showing that two ex-members of the Communist Party had testified that the alien was a card-carrying, dues-paying, meeting-attending member of the Communist Party from 1937 to 1939 and that the alien, after having initially refused to testify, thereafter denied, in administrative proceedings and before the district court, that he had ever knowingly been a member of the Communist Party. The Court said (362 U.S. at 391):

> The determination of this issue turns on evaluation of the testimony before the District Court in the light of *Galvan* v. *Press*, *supra*, and *Rowoldt* v. *Perfetto*, *supra*.

The Court affirmed, *per curiam*, the judgments of the lower courts sustaining the order of deportation. The Court said that the case was unlike *Rowoldt* since there the alien had "admitted membership, see 355 U.S., at 116–117, but accounted for its innocence." In *Niukkanen*, in contrast—the trial judge had indicated his belief that the alien, in denying membership, had perjured himself. The Court therefore emphasized that the solution of the issue largely depended upon the credibility of testimony which the district judge heard, and the Court stated that it could not say that the lower court's findings were erroneous.

The facts in this case show that petitioner, like Galvan and Niukkanen and unlike Rowoldt, was an active, dues-paying, voluntary member of the Communist Party who attended meetings limited to Party members. Two witnesses, who the trier of facts believed, testified that petitioner had been a regu-

lar member of a Communist Party unit from early 1949 until 1951, had paid Party dues for two years, had attended numerous closed meetings of that unit, and had attended a Party convention and a Party executive meeting where those seeking admission were likewise screened (see the Statement, *supra*, pp. 4–6).

Measured by the determinations of this Court in *Galvan* and *Niukkanen*, or by any other meaningful standard, this is not a record of nominal membership. See also *Rystad* v. *Boyd*, 246 F. 2d 246 (C.A. 9), certiorari denied, 355 U.S. 912; *United States ex. rel. Avramovich* v. *Lehmann*, 235 F. 2d 260 (C.A. 6), certiorari denied, 355 U.S. 905. As in *Galvan* there has been no claim by petitioner that this alleged membership was obtained "'accidentally, artificially or unconsciously in appearance only'." Unlike *Rowoldt*, there is nothing in this record which could suggest that petitioner's alleged association was motivated by considerations other than political. Petitioner made no such suggestion, even though the deportation proceedings were reopened at his request to permit him to show that he came within the holding of *Rowoldt*. Moreover, petitioner's membership, unlike that of the other aliens whose cases have come before this Court,[7] extended from early 1949 to 1951, which was not a period of depression or of general lack of consciousness of the operation of the Communist Party as a distinct and active political organization.

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[7] The alleged membership of Galvan was shown to have lasted from 1944 to 1946; that of Rowoldt during the year 1935; that of Niukkanen from 1937 to 1939.

Had there been facts which might have tended to show lack of consciousness of political implications, petitioner was required, as the court of appeals held in its first decision (R. 21), to come forward with them. See also *Schleich* v. *Butterfield*, 252 F. 2d 191 (C.A. 6), certiorari denied, 358 U.S. 814; *Rystad* v. *Boyd*, 246 F. 2d 246 (C.A. 9), certiorari denied, 355 U.S. 912. There is nothing unreasonable about placing upon the alien the burden of overcoming the inference of conscious membership that may naturally be drawn from proof of active participation. It is far more than a fair inference that members of an organization who attend numerous meetings and pay dues regularly over a period of years know whether it is a distinct political organization. In the rare instances where a member lacks this elementary information, his state of mind is a matter peculiarly within his own knowledge. Even in criminal cases it is well established that an adverse inference drawn from the prosecution's case may be strengthened by the failure of a party having knowledge to present evidence which it would be almost impossible to ascertain from any other source. *E.g.*, *Casey* v. *United States*, 276 U.S. 413, 418; *Faraone* v. *United States*, 259 Fed. 507 (C.A. 6); *Jencks* v. *United States*, 226 F. 2d 540, 548–549 (C.A. 5), reversed on other grounds, 353 U.S. 657; Wharton's *Criminal Evidence* (11th ed. 1935), Section 201. In short, the evidence of petitioner's Party activities amply sustains the Board's findings that petitioner was a meaningful member of the Communist Party; if petitioner had any evidence to show that he lacked the requisite

understanding, it was his responsibility to present it.

Contrary to petitioner's claim (Br. 27–32), we are not suggesting that petitioner had the burden of proof to show that he was not deportable. Instead, we contend, as the court of appeals held (R. 21), that petitioner, rather than the government, was required to go forward with any evidence concerning his subjective intent once the government's evidence laid the basis for an inference of knowing membership. When evidence on both sides is presented, the Board is required to evaluate it on the usual basis that the government had the burden to prove meaningful membership in the Communist Party. Since the government did present evidence sufficient to establish meaningful membership and petitioner offered no evidence to rebut it, the Board properly found that the government's burden had been sustained.

As earlier observed, the evidence which petitioner proffered in seeking a second reopening of the administrative hearing could not possibly have changed the result. Petitioner sought merely to testify that he had never supported violent overthrow of the government. But, as argued above (pp. 20–28), this testimony bears no relation to whether petitioner deliberately became a member of the Communist Party as a distinct political organization—the test prescribed by this Court in *Galvan*, *Rowoldt*, and *Niukkanen*.

Petitioner contends (Br. 24–27) that the test of membership as announced in *Rowoldt* has been circumscribed by *Scales* v. *United States*, 367 U.S. 203,

to include only active members. That case, however, set forth the test of membership for the purposes of criminal prosecution under the Smith Act. The decision in *Scales* observes that the provision for the deportation of aliens "rested on Congress' far more plenary power over aliens" and "did not press nearly so closely on the limits of constitutionality as this enactment." *Id.* at 222. It does state, to be sure, that "membership" for purposes of deportation means "more than the mere voluntary listing of a person's name on Party rolls," citing both *Galvan* and *Rowoldt*. *Ibid.* But this is only to state, as we concede, that mere membership in the Communist Party is not sufficient for either criminal prosecution or deportation. It gives no basis whatever for suggesting that the Court was overruling, *sub silentio*, its repeated holdings as to the applicable test in deportation proceedings.

Petitioner's argument fails for another reason. Even if one were to import into the deportation statutes a requirement of "active" membership, the unchallenged evidence shows that petitioner was active. In *Scales*, the Court stated (367 U.S. at 233, note 15):

> The element of "activity" in the proscribed membership stands apart from the ingredient of guilty "knowledge" in that the former may be shown by a defendant's participation in general Party affairs, whereas the latter requires linking him with the organization's illegal activities.

It cannot be seriously questioned that petitioner was active in "general Party affairs." Paying dues, attending closed meetings, participating in an executive session of a Party unit, and appearing at a Party convention certainly constitute ample proof of activity. Against this, petitioner offered only to testify that he did not advocate violent overthrow—a matter quite discrete, as the *Scales* decision itself points out, from the question of active membership.

III

PETITIONER'S APPEAL WAS DECIDED BY A LAWFULLY CONSTITUTED DIVISION OF THE COURT OF APPEALS

Petitioner argues (Br. 33–34) that in this second round of litigation the composition of the court was improper. Petitioner's first appeal came before a division consisting of Judges Edgerton, Danaher, and Bastian, but Judge Edgerton did not participate in the decision. On petitioner's appeal from the dismissal of his complaint urging that the Board had erroneously refused to reopen deportation proceedings for the second time, the government's motion to affirm came before a division consisting of Judges Fahy, Danaher, and Bastian. This division ordered the case transferred to the division which had heard and decided petitioner's original appeal. Petitioner contends that this transfer "violated at least the spirit" of 28 U.S.C. 46, since it was "clearly predictable" that Judge Edgerton would not sit and that therefore his appeal would in effect be decided by the two-judge division which had previously decided against him.

Considering that the whole basis of petitioner's attack on the Board's action was that it was inconsistent with the earlier court of appeals' opinion, it was certainly reasonable to refer the case to the panel which had written the opinion. If, as petitioner asserts but does not establish, it was known that Judge Edgerton would not sit,* it would have been appropriate to appoint a new third member of the division. But this in no event makes out a violation of 28 U.S.C. 46, *supra*, p. 3. Subsection (a) provides that circuit judges shall sit on the court and its divisions in such order and at such times as the court directs; subsection (b) states that the court may authorize the hearing and determination of cases and controversies by separate divisions—each consisting of three judges—to sit at the times and places and hear the cases and controversies assigned as the court directs; subsection (c) provides that cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing in banc is ordered; and subsection (d) says that a majority of the judges authorized to constitute a court or division shall constitute a quorum. Thus, 26 U.S.C. 46 provides that a division shall consist of three judges with two making up a quorum.

* The record is silent why Judge Edgerton did not sit on the first appeal. In his petition for rehearing of the court of appeals' first decision, petitioner indicated that it was because of illness, a reason which does not support the speculation that it must have been known that Judge Edgerton would not participate the subsequent year.

Petitioner's case was referred to a division with the permissible complement of judges and the required quorum decided it. Petitioner has twice had full review by the court of appeals on basically the same issues. He can hardly complain that he has not had his day in court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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